IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4578 of 1990

with

SPECIAL CIVIL APPLICATION No 4111 of 1990

with

SPECIAL CIVIL APPLICATION No 4112 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SOLANKI RAMESHBHAI VIRABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 4578 of 1990
MR AV TRIVEDI for Petitioner
MR PREMAL JOSHI for
M/S PATEL ADVOCATES for Respondent No. 1, 2

2. Special Civil Application No 4111 of 1990
MS SEJAL SUTARIA for Petitioner

MR PREMAL JOSHI for
M/S PATEL ADVOCATES for Respondent No. 1, 2

3. Special Civil Application No 4112 of 1990
MS SEJAL SUTARIA for Petitioner
MR PREMAL JOSHI for
M/S PATEL ADVOCATES for Respondent No. 1, 2

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 20/12/2000

C.A.V. JUDGEMENT

#. As in all these three matters, the grounds raised for challenge of the order of termination of services of the petitioners and the facts are almost similar, the same are being taken up for hearing together and are being disposed of by this common order.

#. In special civil application No.4578/90, this court had not protected the petitioner by grant of interim relief. However, in two other matters, interim relief has been granted in favour of those petitioners and they are continuing in service. Leading arguments in these three matters were advanced by Shri A.V.Trivedi, learned counsel for petitioner in special civil application No.4578/90. Those arguments have been adopted by Ms.Sejal Sutaria appearing for petitioners in two other matters.

#. It is not in dispute that the petitioners were given appointments as class-IV by respondent No.2 at the Civil Hospital, Mehsana.

#. Reply to the special civil application No.4111/90 has been filed and therein it is stated that their appointments were illegal and accordingly their services were terminated. It has further been stated that the appointments were made purely on temporary basis and it was open to the respondent No.2 to terminate their services without giving any notice as per the terms of appointment. It is further stated that the names of petitioners were not called for from the Employment Exchange or their names were also not sponsored by the Social Welfare Officer concerned. Names of the petitioners were suggested by Gujarat Pradesh Dalit Varg Sangh and the respondent No.2 had appointed the petitioners. The respondents have also taken preliminary objection regarding maintainability of the special civil

application on the ground that the petitioners have efficacious alternative remedy available to approach to the Gujarat Civil Services Appellate tribunal. During the course of arguments, the learned counsel for the respondents raised another contention that these petitions are not maintainable as it is a matter of termination of services of the petitioners and it was alleged to be in violation of Section 25F of the Industrial Disputes Act, 1947, for which remedy is available under the Act aforesaid which has to be availed of.

#. The learned counsel for the petitioners contended that the services of the petitioners were brought to an end in violation of the provisions of Section 25F of the Industrial Disputes Act, 1947. Second contention has been raised that the persons junior to the petitioners were retained in service whereas the services of the petitioners were dispensed with. Next contention is made that the respondents, while affecting the termination of services of the petitioners, adopted pick and choose method. It is submitted that along with the petitioners, many other persons have been appointed but the persons who were at sr.no.8 & 9 in the list prepared have been retained in service. Lastly, it is contended that the termination of the services of the petitioners is bad as the provisions of Rule 33(1)(b) of the Bombay Civil Service Rules, 1959, have not been followed, meaning thereby, the petitioners were not given one month's notice or one month's pay in lieu of notice. In support of his contention, the learned counsel for the petitioners placed reliance on the decision of this court in the case of Sub Divisional Soil Conservation Officer & anr. v. M.M.Saiyed, reported in 1990(1) GLH 518 and that of the apex court in the case of V.P.Ahuja v. State of Punjab & ors., reported in AIR 2000 SC 1980.

#. The learned counsel for the respondents strongly opposed these special civil applications and reiterated those very contentions raised in the reply to the special civil application No.4111/90. In addition to this, he further contended that the very appointments of the petitioners were back-door entries and in case the termination order of their services is set aside, this court will restore the illegal appointment order. It is settled law that this court sitting under Article 226 of the Constitution will not perpetuate illegality. In support of his contention, Mr. Premal Joshi, the learned counsel for the respondents placed reliance on the following decisions:

- State of Gujarat & Anr. v. P.J.Kampavat & Ors. - 1993(1) GLR 848

- Nilesh Bhatt & Ors. v. Administrative Officer, Nagar Pradhamik Shikshan Samiti & Ors. - 1996(1) GLH 108

- Rupsinh Sonsinh Parmar & Ors. v. Sabarkantha District Panchayat & Ors. - 1998(1) GLH 263

- Dhanjibhai Ramjibhai v. State of Gujarat - 1985 (2) GLR 862

#. I have given my thoughtful considerations to the submissions made by learned counsel for the parties.

#. In special civil application No.4578/90, the order of termination of services of the petitioners is filed. In two other cases, the petitioners have not filed the order of termination of their services. Even in the special civil applications it is not stated on which date these orders have been passed. It is no more res-integra that unless a copy of the order impugned and prayer is made for quashing and setting aside thereof, is filed, no relief can be granted to the petitioner. Reference in this respect may have to the decision of the Apex court in the case of Surendra Singh v. Central Government & ors. reported in 1986(4) SCC 667 : AIR 1986 SC 2166. In these two special civil applications, prayer has been made that the action of the respondents to terminate the services of the petitioner be declared erroneous and violative of Article 14 of the Constitution of India. Though artistically prayer has been made but in substance, prayer is for quashing and setting aside of the order of termination. It is a different matter that this court has protected the petitioners but otherwise, unless a copy of the orders are filed, these petitions were not maintainable nor any relief could have been granted. Be that as it may, as the respondents have admitted that the services of the petitioners in these two special civil applications have not been terminated, I am not dismissing these petitions on this ground and considering the matter on merits.

#. The very fact that this termination of services of the petitioners was stated to be in violation of the provisions of Section 25F of the Industrial Disputes Act, 1947, there remains no doubt in the mind of the court that the petitioners accepted the fact that they are the `workmen' and the hospital where they have been posted, an `industry'. It is a case where the petitioners are

seeking benefits of the provisions under a specific Statute and in case where in that statute specific remedy is provided for making grievances against the termination, then that remedy has to be availed of. I find sufficient merits in the contention of Mr.Premal Joshi, AGP, that efficacious alternative remedy was available to the petitioners in the matter to raise industrial dispute. Once that remedy is available to the petitioners then certainly that has to be availed of and the court has to discourage the litigants to directly come up before this court where they have efficacious alternative remedy under the statute. This tendency of litigants to directly come up before this court in the matters where efficacious alternative remedy of raising industrial dispute or appeal, revision, etc., under the Statute is available deserves to be deprecated. Another preliminary objection raised by learned counsel for the respondents that the petitioners had also alternative remedy of filing appeal before the Gujarat Civil Services Appellate Tribunal is also of substance. If we go by the Schedule to the Gujarat Civil Services Appellate Tribunal Act, 1972, I find that the order of discharge of an employee from services is appealable. Here also, if we go by the order of termination of services of the petitioner filed in one case, it is a simpliciter discharge/ termination of services of the petitioner and the petitioners had a statutory remedy of appeal available. In the petitions, more particularly in paragraph 13 thereof, the petitioner has deliberately and purposely made an incorrect statement of fact that he has no other alternative efficacious remedy save except this petition. In this matter, the petitioners had two alternative efficacious statutory remedies available, i.e. first of raising industrial dispute under the provisions of the Industrial Disputes Act, 1947, and another, a statutory right of appeal under the Gujarat Civil Services Appellate Tribunal Act, 1972. However, these matters are pending since 1990 and after hearing the learned counsel for the parties, I am satisfied that the petitioners have no case on merits and as such, I do not dismiss these matters on this ground and to give another fresh life to these litigants by way of availing of alternative remedy by them.

##. So far as the first contention raised that the services of the petitioners were brought to an end in violation of Section 25F of the Industrial Disputes Act, 1947, it is suffice to say that this contention is not available to the petitioners for the simple reason that this can only be agitated, raised and gone into in the industrial dispute raised by the petitioner. The very

fact that the petitioners have not raised industrial dispute, is clearly suggestive of the fact that they have given up their this challenge to the order of termination of services and this court needs not to examine and go on this question.

##. So far as second contention raised that the juniors were retained and seniors' services were terminated, it is to be stated that the petitioners have not produced any seniority list nor they could have produced because their appointments are purely adhoc and temporary for three months and for such appointees there may not be any seniority list. Though the petitioners have stated that they have been appointed after selection, it is difficult to accept this version of the petitioners as the applications were not invited from the open market. The names were not called from the Employment Exchange as well as Social Welfare Department and the petitioners have not given out the constitution of the selection committee. Apart from this, these appointments have been made purely on temporary basis for three months and they cannot be taken to be appointments after selection. If we go by the facts of this case, it is a clear case where on the basis of names sent or sponsored by Gujarat Pradesh Dalit Varg Sangh, these appointments have been made. I fail to see and the learned counsel for the petitioners have also failed to show under which provisions it was permissible to this Sangh to sponsor the names and consequently, obligatory on the part of the respondent No.2 to make appointments from this list. These are nothing but only back door entries. These appointments have been made dehors the recruitment rules and if the recruitment rules are not there then of the Articles 14 & 16 of the Constitution of India.

##. The learned counsel for the petitioners then contended that these appointments were made on probation, but merely because in the appointment orders, it has been mentioned as `AJMAYISH', it cannot be taken to be the appointments on probation. The order has to be read as a whole and further the other facts have to be considered and if we go by all these, then these are purely temporary appointments made for fixed term for three months. The order clearly reveals two things; the appointment for three months and that it is temporary appointment which is liable to be terminated without notice. The appointment on probation could have been made only after recruitment in accordance with the recruitment rules or under Articles 14 & 16 of the Constitution of India. The petitioners, no doubt, are SC but for making appointments against reservation quota,

recruitment rules or in the absence of recruitment rules, Articles 14 & 16 of the Constitution of India have to be followed. As per recruitment rules and Articles 14 & 16 of the Constitution of India, appointments are to be made by giving opportunity to all the eligible persons and that is possible only by calling applications by way of advertisement or names are to be called from Employment Exchange or Social Welfare Department. That has not been done nor any selection has been made as even constitution of selection committee has not been given. In these facts on which no dispute has been raised by learned counsel for the petitioners, these are only temporary appointments for fixed term of three months and on the condition of being liable to be terminated without notice and in fact and substance, the back door entries.

##. It is not in dispute that along with the petitioners, some other persons have also been appointment and their services were retained. In case the appointments of petitioners were irregular as per say of respondents, certainly the appointments of those two other persons were also irregular and their services are to be terminated. But the question that falls for consideration is whether only on this basis, a plea of discrimination can be permitted to be raised by petitioners? If we go by the facts of this case, certainly the appointments of the petitioners and that of those persons named in one of the petition in paragraph-8 thereof were irregular. It is no more res-integra that a plea of discrimination on the basis of irregular and unwarranted orders of the officers cannot be permitted to be raised by the litigants. On the basis of this act of respondents to continue irregular appointments of some of the persons, the petitioners cannot be given the benefit on the ground of discrimination. It is done, then what this court will do is not only continue these irregular appointments but further will set aside the order of termination of the petitioners who were irregularly inducted in services and as a result of which, perpetuate illegality. Reference in this respect may have to the decision of the apex court in the case of Chandigarh Administration v. Jagjit Singh reported in AIR 1995 SC 705 and the latest decision of the Hon'ble Supreme Court in the case reported in 2000 AIR SCW 2389.

##. The last contention raised that the termination of services of the petitioners has been made without any notice or notice pay as required under Rule 33(1)(b) of the Bombay Civil Service Rules, is also devoid of merits and substance. Each case has to be decided on its own facts and ratio of decision is on the facts of that case.

When the appointments of the petitioners are irregular and in case the order of termination of their services is set aside on the ground that the provisions of Rule 33(1)(b) of the Bombay Civil Service Rules has not been followed, then it will result in revival of or restoration of the irregular appointment order and this will be resulted to continue those illegal appointees. This court, sitting under Article 226 of the Constitution will not perpetuate any illegality. This court can legitimately decline to interfere with the order of termination of services of the petitioners though it may be made in violation of the provisions of Rule 33(1)(b) of the Bombay Civil Service Rules or Section 25F of the Industrial Disputes Act where quashing of the same will result in revival of irregular appointment. In catena of cases of different High Courts as well as Hon'ble Supreme Court, it has been held that this court may decline to issue a Writ of Mandamus or certiorari where the effect of quashing the impugned order would be to restore illegal order. Exactly here in case what the learned counsel for the petitioners contended is to be accepted, and relief is granted to the petitioners as prayed for, it will result in restoration of irregular appointments of the petitioners. Reference here may have to the following decision of the Apex as well as of different High Courts:

* AIR 1966 SC 828

* Jagan Singh v. State Transport Appellate Tribunal, Rajasthan & Anr. - AIR 1980 (RAJ) 1

* Himmat Jain v. The State of Rajasthan & Ors. AIR 1994 (RAJ) 53

* A.M. Mani v. Kerala State Electricity Board - AIR 1968 (KERALA) 76

* Devendra Prasad Gupta v. The State of Bihar & ors. - AIR 1977 (PATNA) 166

* Chintamani Sharan Nath Sahadeo v. State of Bihar & Ors. - AIR 1990 (PATNA) 165

##. In view of the discussion aforesaid, the reliance placed on the decision of this court and that of the Hon'ble Supreme Court is of little help to the petitioners.

##. In the result, all these three petitions fail and the same are dismissed. Rule discharged in each

petitions. Interim relief granted in two matters stands vacated. In the facts of the case, no order as to costs.

.....

(sunil)